



State of West Virginia
Department of Health and
Human Resources

Bureau for Public Health Office of
Environmental Health Services

Escalating Enforcement Response Policy

December 2013

Table of Contents

<u>Table of Contents</u>	2
<u>Policy Overview</u>	3
<u>The Enforcement Targeting Tool</u>	6
<u>ETT Formula</u>	6
<u>How to Address Systems with ETT Score</u>	8
<u>Tiered Enforcement Response</u>	8
<u>Three Levels of Enforcement Actions</u>	9
<u>Level 1 Violations – Reminder Letter (Informal Action)</u>	9
<u>Level 2 Violations- Notice of Violation (Informal Action)</u>	11
<u>Level 3 Violations – Formal Action</u>	12
<u>Escalation of Enforcement Action:</u>	14
<u>Referral to EPA</u>	16

Tables and Figures

Table 1: Staff Roles and Responsibilities	4
Figure 1: Acute Contaminants	6
Table 2: Severity Point System	7
Table 3: Contents of a Reminder Letter	10
Table 4: Contents of an NOV	11
Table 5: Permits that May be Suspended	13

Policy Overview

West Virginia Department of Health and Human Resources (WVDHHR) has primary enforcement authority for the Safe Drinking Water Act (SDWA) regulations. To ensure that public water systems (PWSs) comply with the regulations, the Central Office (CO) staff must establish PWS sample schedules and treatment requirements, track compliance with those requirements, and, where necessary, assign violations. Once a violation is determined, WVDHHR must take steps to assure that systems return to compliance (RTC).

The goal of this Escalating Enforcement Response Policy (EERP) is to promote appropriate, consistent, and timely enforcement of West Virginia's environmental statutes and rules in a manner that is transparent to all who are affected, including the regulated community. The policy also focuses on return to compliance, instead of steps taken to address a violation, with the goal to achieve maximum protection of public health.

To accomplish these goals, the EERP sets forth staff roles and responsibilities (please see Table 1 below), an enforcement targeting system, the tools that may be used for enforcement, and the tools' appropriate application. Provisions for escalating enforcement response also are outlined.

To ensure that the policy remains relevant and valuable, the EERP will be reviewed on a biennial basis and revised as necessary.

Table 1: Staff Roles and Responsibilities

Title	Role
Division Director	<ul style="list-style-type: none">• Responsible for establishing enforcement policies and procedures for the Division, including any subsequent revisions.• Upon validation of a violation, only the Division Director or their designee can determine—either on a case-by-case basis or by criteria provided in this EERP—that a written Notice of Violation (NOV) or other enforcement action will not be issued against a violator and that the violation does not warrant processing under this EERP.• Only the Division Director or their designee shall have the flexibility and authority to render a determination—either on a case-by-case basis or by criteria provided in this EERP—for the necessity and appropriateness of the pursuit of administrative and/or legal enforcement actions against a violator.• The Division Director or their designee also has specific responsibilities in enforcement cases as prescribed in the criteria and procedures established in this document and accompanying standard operating procedures (SOPs) TO COME.
Engineer Senior Manager: District Office Coordination and Enforcement	<ul style="list-style-type: none">• Responsible for coordination between the Compliance and Enforcement Section in the CO and District Office staff, where noted in this EERP and accompanying SOPs TO COME.
Enforcement Section	<ul style="list-style-type: none">• Unit within the CO that reports to the Division Director and is responsible for assuring adherence to this EERP and accompanying SOPs TO COME.• This section shall act as a liaison between District Office field personnel and the Division Director in investigating, preparing and tracking enforcement cases.• The Enforcement Section Chief is normally the individual who will function as the Division Director’s designee in enforcement matters as provided by this EERP.
Compliance Monitoring Staff	<ul style="list-style-type: none">• Compliance monitoring staff refers mainly to CO staff; however, may also include staff from other sections and offices involved in

	<ul style="list-style-type: none">• compliance monitoring activities.• Responsible for overseeing PWS compliance with statutory, regulatory, licensing and certification requirements.• Responsible for initiation of enforcement activities described in this EERP and accompanying SOPs TO COME.
District Office Manager	<ul style="list-style-type: none">• Responsible for coordinating enforcement activities in his/her area, including the prioritization and scheduling of enforcement activities and inspections.• The District Office Manager (DOM) is responsible for monitoring a violator's efforts and progress towards compliance with issued enforcement actions, such as Administrative Orders (AOs).• Responsible for initiating further enforcement action if compliance schedules are not met, as described in the accompanying SOPs TO COME.• Responsible for the prioritization and referral of enforcement cases from his/her office to the CO's Engineer Senior Manager in charge of DO coordination and enforcement.• The DOM also has specific responsibilities in enforcement cases as prescribed in the criteria and procedures established in this EERP and accompanying SOPs TO COME.
District Office Staff	<ul style="list-style-type: none">• Responsible for proper documentation of inspection, investigation and sanitary survey finding(s); follow-up visits; telephone conversations and other such activities related to an inspection/enforcement action done by the District Office to investigate a violation or determine progress made on RTC. Such documentation will provide a clear, well-documented history of any violation in the event that further enforcement actions become necessary.

Enforcement Targeting System

The EERP ensures that enforcement decisions and actions taken are proportional to the degree of potential harm caused by the violation. The policy prioritizes enforcement efforts by first identifying systems with health-based violations or a history of violations for any rules, and then weighting violations based on severity. Expected or actual return to compliance is weighed in the prioritization ranking too.¹ To prioritize systems for enforcement, WDHHR will use the scores generated by EPA's Enforcement Targeting Tool (ETT).

The Enforcement Targeting Tool^{2,3}

The ETT uses a formula to assign a score to each system based on its unaddressed violations within the past 5 years. The formula does not include violations that have returned to compliance or are on the "path to compliance" through a formal enforceable action. The "path to compliance" is the status of a public water system that has been placed under a formal enforceable action to return it to compliance. A formal enforcement response is defined as one which requires specific actions necessary for the violator to return to compliance, is based on a specific violation, and is independently enforceable without having to prove the original violation.⁴

EPA's ETT formula only considers violations for Federally-regulated contaminants.⁵ Each violation is assigned points, with weighting based on its threat to public health. Points for all unaddressed violations are summed to generate an ETT score.

ETT Formula

The two factors of the formula include:

Figure 1: Acute Contaminants

The ETT scoring more heavily weights acute contaminants, which pose the greatest risk to public health. Acute contaminants include:

- enteric viruses
- pathogens, including *E. coli*, fecal coliform, *Cryptosporidium*, *Giardia lamblia*, enterococci, and *Legionella*
- nitrate
- nitrite

¹ WVDHHR's new EERP is modeled closely on the EPA's Enforcement Response Policy, December 2009.

² EPA, Drinking Water Enforcement Response Policy, page 3. De

³ Language based on South Dakota factsheet

⁴ EPA has defined what constitutes a "formal" enforcement response in Water Supply Guidance 27 (WSG 27), "Guidance for FY 1987 PWSS Enforcement Agreements". This definition in WSG 27 was adopted into the December 2009 EPA ERP.

⁵ In a future iteration of this policy, WVDHHR hopes to determine how to add scoring for state violations to the ETT scoring calculator. Examples of state violations that would be tracked include: cross-connection control violations, operator deficiencies (such as not having enough or adequately certified operators).

1. Severity of the violation based on a modification of EPA's Public Notification Tiers.⁶ The severity or weight of the violation is highest for health-based violations for the acute contaminants, listed in Figure 1, above; lower for chronic and other health-based violations, including nitrate monitoring and total coliform repeat monitoring violations; and lowest for the remaining monitoring, reporting, and other violations. Violations under the same rule, with the same compliance period begin/end dates and violation codes, will get grouped together. For example, a system that fails to monitor for 21 VOCs in the same compliance period would only receive a score of 1, and not 21. Table 2 illustrates the severity point system.

Table 2: Severity Point System	
Severity Points	Type of Violation
10 points	-Nitrate and Nitrite MCLs -Acute Total Coliform Rule (TCR) MCLs -Maximum Residual Disinfection Level (MRDL) violation for CLO ₂ -Turbidity MCLs
5 points	-Other chemical MCLs - Non-acute TCR MCLs, - Treatment Techniques (TTs) - TCR repeat monitoring and reporting (M/R) violations - Nitrate M/Rs
1 point	Everything else, e.g., consumer confidence rule (CCR) violations, record keeping, public notice (PN) violations, M/Rs not mentioned above.

2. The number of years that a system's violations have been unaddressed.

The following formula creates the ETT score:

S = violation severity factor for each violation (see Table 1 for severity points)

n = number of years that the system's oldest violations has

been unaddressed (0 to 5 years). The number of years is based on calendar years and the current calendar year score counts as "0".

⁶ Title 40 Code of Federal Regulations, Part 141, Subpart Q, "Public Notification of Drinking Water Violations," Section 141.201.

How to Address Systems with ETT Score

The ultimate goal of the EERP is to return to compliance as quickly as possible. And, regardless of a water system's position on the ETT priority list, WVDHHR will act immediately on acute, health-based violations and subsequently confirm the PWS's return to compliance.

Tiered Enforcement Response

Each quarter, an ETT score will be calculated for all systems with violations that are not returned to compliance or on a path to compliance. The following steps will occur depending on the system's ETT score:

- Systems with an ETT score at or above 11 must be addressed with a formal enforcement action within 45 days.⁷
- Systems with an ETT score at or above 6 will be evaluated to determine what state actions may prevent the system from additional violations that could lead to a score of 11 or above. The evaluation may be to send a reminder letter, to recommend technical assistance from the DO or to refer to other teams within the program, such as to the Infrastructure and Capacity Development group, which will determine whether a Capacity Development assessment is an option.

Response to violations should escalate if the violations remain unaddressed. (Escalation of enforcement actions is discussed in the next section.)

Flexibility may be permitted to meet the deadline for return to compliance or formal enforcement in some circumstances where return to compliance is imminent or expected

⁷ EPA considers systems with an ETT score at or above 11 to be an enforcement priority and defines an appropriate formal action or RTC within two calendar quarters as timely.

within six months. However, any change from the above schedule requires approval by the DD or their designee.

Examples of circumstances that may permit an extension of the deadline include:

- System is adding a new treatment to address MCL issues.
- System is constructing a new plant or well.
- System is in the process of hooking up to another water system.

Violations addressed by a return to compliance action or formal enforcement will not be included in the system's score in subsequent quarters but will still appear on the EERP list for tracking purposes.

Six Levels of Enforcement Actions

This section describes escalating enforcement actions.

Level 1 Actions– Reminder Letter (Informal Action)

Level 1 informal actions shall be in the form of reminder letters or other actions taken to help system be aware of a pending deadline or requirement for the sole purposes to prevent violations from occurring. A Reminder Letter is normally issued for Level 1. As shown in Table 3, the letter lists the reason for the reminder; the dates when the samples or actions should be taken and instructs the water system to contact the laboratory that they use for monitoring supplies, if applicable. The letter also explains how to submit the information for the state's consideration. **A Reminder Letter can be issued for any system regardless of the ETT scores from EPA.**

Templates for the Reminder Letter (which have already been provided as PDF files by WVDHHR), will be attached in an appendix to the SOPs.

Table 3: Contents of a Reminder Letter

- Reason for violation (missing sample results, CCR, or PN)
- Dates when samples, report, or notice should have been taken
- Instructions to contact laboratory for monitoring supplies, if applicable
- How to submit the missing information, if the system believes the violation was

Level 2 Actions- Notice of Violation (Formal Action)

Level 2 represents a violation has occurred. A Notice of Violation (NOV) will be issued for all violations. Level 2 Actions shall be violation notifications in the form of an NOV and shall be issued to all violators.

- NOV's shall be issued for all violations regardless of ETT score.
- An NOV is the lowest level formal enforcement mechanism used by WVDHHR. As shown in Table 4, the NOV contains a description of the violation; cites the applicable law or rule; provides a statement of what is required to resolve the deficiency and return to compliance with an accompanying compliance schedule; requests PN and provides a PN template populated with the PWSID, system name, and violation and provides a PN certification form that the water system must submit to the state after PN is completed.

Table 4: Contents of an NOV

- Description of the violation
- Citation of applicable law or rule
- Steps required to resolve the deficiency and RTC
- Compliance schedule
- PN request (including template for PN and certification form to submit

- An NOV will be issued within 45 days after the end of the compliance period.

To be included with the SOPs: Enforcement Section staff will issue an NOV after violations have been validated and the action has been approved by the Enforcement Section Chief. Staff will enter the action into a tracking system, and the Enforcement Section Chief will receive a report that the NOV was sent. Templates for the NOV (which have already been provided as PDF files by WVDHHR), will be attached in an appendix to the SOPs.

Level 3 Actions- Permits Considerations and Administrative Orders (AO) (Formal Action)

Level 3 actions represent the more serious violators, where there is a documented ETT score greater than 10 points.

- Level 3 actions shall be taken for violators with a significant prior history of noncompliance with regulations based upon an ETT score greater than 10 points.
- Level 3 actions are a result of continued noncompliance with Level 2 actions (see Escalation section).
- Several steps may be taken at Level 3, including:
 - Step one: Evaluation by Compliance Officers of the benefit of a Capacity Development Assessment. For example, has the water system had a recent assessment? Would it benefit from a new one? Note that this option is only available to CWSs and NTNCWSs.

- Step two: Possible suspension of permit.
Table 5 lists the permits that may be suspended when a system reaches Level 3. Step two shall always begin with a warning of possible permit suspension. Then if noncompliance still exists after an appropriate designated timeframe, a permit suspension request shall be made.
- Step three: When none of the permits listed in Table 5 govern the water system, or where the threat or actual suspension of the permit has not achieved return to compliance, an AO without civil penalties would be issued.

Table 5: Permits that May be Suspended

Permits Issued Under the General Sanitation Rule:

- Campgrounds
- Lodging
- Swimming Pools
- Restaurants

Manufactured Housing Rule:

- Mobile Home Parks (MHPs)

Mass Gatherings (Issued by Local Health Department):

- While unlikely, depending on duration, the gathering could be a TNCWS

WVDHHR already has a template for an AO. That template will be modified to add language for a version with civil penalties when SOPs are developed. Envision that Enforcement Section staff will issue an AO after violations have been validated and action has been approved by Enforcement Section Chief. To issue an AO with civil penalties, the DD or their designee also

must approve the action. Staff will enter action into a tracking system, and the Enforcement Section Chief will receive a report that an AO was sent.

Level 4 Actions – Predetermination Meeting (Formal)

After AO in Level 3, step 3 has not been successful for return to compliance or to be on the path; the system shall be notified to participate in a compliance predetermination meeting. This meeting will be to outline all issues and set a plan for a path to compliance. The notice for this meeting shall outline all previous attempts to return system into compliance and shall also reference items associated with step five to come with further noncompliance.

Level 5 Actions – AO with Penalty (Formal)

Failure to return to compliance or to be on the path to compliance and meet the compliance schedule issued in previous steps shall lead to issuance of an AO with civil penalties. The decision to elevate the action and issue an AO with civil penalties will be reached by compliance officers in consultation with the Enforcement Section Chief and Division Director.

WVDHHR already has a template for an AO. That template will be modified to add language for a version with civil penalties when SOPs are developed. Envision that Enforcement Section staff will issue an AO after violations have been validated and action has been approved by Enforcement Section Chief. To issue an AO with civil penalties, the DD or their designee also must approve the action. Staff will enter action into a tracking system, and the Enforcement Section Chief will receive a report that an AO was sent.

Level 6 Actions – EPA Referral (Formal)

If all actions taken in previous steps have failed to return to compliance or to be on path to compliance, the compliance officers in consultation with the Enforcement Section Chief and Division Director may elect to refer the matter to the EPA for issuance of federal enforcement actions.

Escalation of Enforcement Action:

Once enforcement is initiated, the system's progress towards return to compliance is

monitored in a monthly “tickler report” produced for the Enforcement Section Chief. The report will describe the current compliance status for each system with an ETT score. If the system has not returned to compliance, the system will be evaluated to determine whether escalation to a higher level of enforcement action is warranted.

- If a Level 2 deficiency is not corrected by the deadline specified in an NOV, the system will be flagged by Compliance and Enforcement Section staff in the tracking system. Depending on the violator’s response to an NOV and/or the potential or actual harm to public health of ongoing noncompliance, the Enforcement Section Chief may determine that staff should issue an AO per Level 3.
- If after AO issuance deficiency is not corrected by the deadline specified in the AO in Level 3, the system will be flagged by Compliance and Enforcement Section staff in the tracking system. Depending on the violator’s response to the AO and/or the potential or actual harm to public health of ongoing noncompliance, the Enforcement Section Chief may determine that staff should require a predetermination meeting per Level 4.
- If after request for a predetermination meeting deficiency is not corrected by the deadline specified in meeting, the system will be flagged by Compliance and Enforcement Section staff in the tracking system. Depending on the violator’s response and/or the potential or actual harm to public health of ongoing noncompliance, the Enforcement Section Chief may determine that staff should issue an AO with civil penalties per Level 5.
- Failure to meet the terms of an AO with civil penalties will be flagged by Enforcement Section staff in the tracking system. The Compliance and Enforcement Section Chief will confer with the DD and determine whether the system should be referred to EPA Region 3 for follow-up enforcement action per Level 6.

The evaluation of whether to escalate enforcement activity will weigh the extent to which the violator deviates from the requirements outlined in any reminder letter, NOV, or AO. Deviation

may be significant either because a requirement is not met, or is not met in a timely manner, or work is not performed in the manner required. The level of deviation which is “significant” will be determined based on the facts of each case. In some cases, a violation of a reminder letter, NOV, or AO may be so minor that it would not merit the resource commitment necessary to pursue additional formal enforcement response. But for any deviation which is significant, and which therefore warrants additional enforcement action, the enforcement action should be escalated above the type of action which was already taken. For example, violation of an AO with civil penalties would result in a referral to EPA Region 3, since someone who violates the order is unlikely to take a second order any more seriously than the first.

The following should be considered in determining the significance of the deviation⁸:

- Failure to perform work specified in the enforcement response.
- Whether the violation of the reminder letter, NOV, or AO might interfere with the violator's ability to fully comply with other terms of the enforcement action, or to comply in a timely manner.
- When a deadline in a compliance schedule is significantly missed, escalation is indicated unless (1) timely compliance was impossible because of an unforeseeable event beyond the reasonable control of the violator and the results of which could not have been avoided or repaired in order to prevent the noncompliance, and (2) the violator promptly notified WVDHHR of the problem and WVDHHR agreed to necessary schedule changes.

Referral to EPA

WVDHHR has the primary lead for enforcement in West Virginia. However, where the state has been unsuccessful in obtaining return to compliance for a system with attempts made by the

⁸ Based on escalation criteria outlined in the State of Connecticut, Department of Environmental Response Policy, “Enforcement Response Policy”, June 1999.

Compliance & Enforcement Section to achieve compliance via Levels 1 thru 5, the DD may confer with the Enforcement Section Chief and decide to refer the case to EPA per Level 6. The referral will be made within 120 days after the Enforcement Section Chief examines systems flagged for failure to meet the terms of their AO. Regular communication, including conference calls, will assure and facilitate coordination with EPA on referred enforcement cases and compliance status.

16December 2013